

12-336-cv

Fowlkes v. Ironworkers Local 40, et al.

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United States Court of Appeals
FOR THE SECOND CIRCUIT

August Term, 2014

(Argued: September 24, 2014 Decided: June 19, 2015)

Docket No. 12-336-cv

COLE FOWLKES,

Plaintiff-Appellant,

–v.–

IRONWORKERS LOCAL 40, DANNY DOYLE, KEVIN O’ROURKE,

*Defendants-Appellees.**

B e f o r e :

LEVAL, CHIN, and CARNEY, *Circuit Judges.*

Plaintiff-Appellant Cole Fowlkes appeals from a December 20, 2011
judgment of the United States District Court for the Southern District of New

* The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above.

1 York (Preska, *Chief Judge*) dismissing his *in forma pauperis* complaint for lack of
2 subject matter jurisdiction. Fowlkes, who self-identifies as male but was born
3 biologically female, alleges that his labor union, Ironworkers Local 40, and two of
4 its business agents, Danny Doyle and Kevin O'Rourke, discriminated against
5 him on the basis of sex and retaliated against him for filing an earlier action
6 against them. Invoking its authority to screen an *in forma pauperis* complaint at
7 any time, the District Court, acting *sua sponte*, held that Fowlkes's failure to
8 exhaust administrative remedies deprived the court of subject matter jurisdiction
9 over his federal claims. The District Court thus also dismissed Fowlkes's state-
10 and city-law claims for lack of jurisdiction.

11
12 We conclude that the administrative exhaustion requirement of Title VII,
13 42 U.S.C. § 2000e-5(e), is not a jurisdictional prerequisite to suit in federal court,
14 but rather is a necessary precondition to suit and is subject to equitable defenses.
15 We therefore **VACATE** the District Court's judgment dismissing Fowlkes's
16 federal claims for lack of jurisdiction and **REMAND** for the District Court to
17 determine whether any equitable defenses excuse Fowlkes's failure to exhaust
18 his administrative remedies. On remand, the District Court shall also entertain
19 Fowlkes's claim under the National Labor Relations Act, 29 U.S.C § 151, *et seq.*,
20 for breach of the duty of fair representation, and shall revisit, in light of the
21 pending federal claims, whether to exercise supplemental jurisdiction over
22 related state- and city-law claims.

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VACATED AND REMANDED.

ROBERT T. SMITH (Tami Kameda Sims and Howard R.
Rubin, *on the brief*), Katten Muchin Rosenman
LLP, Washington, DC, and Los Angeles, CA, *for*
Appellant.

JOHN S. GROARKE (Jennifer D. Weekley, *on the brief*),
Colleran, O'Hara & Mills LLP, Woodbury, NY,
for Appellees.

1 SUSAN L. CARNEY, *Circuit Judge*:

2 Plaintiff-Appellant Cole Fowlkes appeals from a December 20, 2011
3 judgment of the United States District Court for the Southern District of New
4 York (Preska, *Chief Judge*), dismissing his *in forma pauperis* complaint for lack of
5 subject matter jurisdiction. Fowlkes, who self-identifies as male but was born
6 biologically female, alleges that his union, Ironworkers Local 40 (the “Local”),
7 and two of its business agents, Danny Doyle and Kevin O’Rourke (the Local,
8 Doyle, and O’Rourke, together, “defendants”), discriminated against him on the
9 basis of sex and retaliated against him for filing an earlier action against them.
10 The discrimination and retaliation alleged by Fowlkes primarily consisted of
11 refusing to refer Fowlkes for work through the Local’s hiring hall.

12 The District Court construed Fowlkes’s complaint as stating federal claims
13 under Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e, *et*
14 *seq.*, and related state- and city-law claims. Invoking its authority pursuant to 28
15 U.S.C. § 1915(e)(2)(B) to screen an *in forma pauperis* complaint at any time, the
16 District Court, acting *sua sponte*, held that Fowlkes’s failure to exhaust
17 administrative remedies for his Title VII claims deprived the court of subject
18 matter jurisdiction over those claims. On the understanding that no federal

1 claim remained after the Title VII claims' dismissal, the District Court declined to
2 exercise supplemental jurisdiction over the related state- and city-law claims, and
3 entered a judgment dismissing Fowlkes's complaint *in toto*.

4 For the reasons stated below, we conclude that the District Court erred in
5 its determination that Fowlkes's failure to exhaust administrative remedies
6 deprived it of subject matter jurisdiction over his Title VII claims. In addition,
7 we conclude that Fowlkes has stated a federal claim under the National Labor
8 Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, for the Local's breach of its duty
9 of fair representation. Accordingly, we vacate the judgment dismissing
10 Fowlkes's amended complaint and remand the cause to the District Court. On
11 remand, the District Court shall: (1) consider whether any equitable defenses
12 excuse Fowlkes's failure to exhaust his administrative remedies for his Title VII
13 claims; (2) conduct further proceedings on Fowlkes's duty of fair representation
14 claim; and (3) reevaluate whether to exercise supplemental jurisdiction over
15 Fowlkes's pendent state- and city-law claims and conduct any further
16 proceedings on those claims as it determines may be warranted.

BACKGROUND

I. Factual Background¹

Fowlkes is a journeyman ironworker and a member of Local 40. As a journeyman ironworker, Fowlkes would (in his words) detonate “caps/blow cement from steel/use torch to cut/burn steel[,] preparing it for the welder.” 2011 Am. Compl. at 15. Although Fowlkes was born biologically female and was named “Colette,” he now self-identifies as a man, preferring to be called “Cole” and to be referred to in the masculine. *Id.* at 1; Appellant’s Br. at 3.

To place its members at job sites, the Local ran a hiring hall, and Doyle and O’Rourke, as business agents for the Local, participated in the placement process. Fowlkes alleges that, beginning as early as 2005, the Local refused to refer him to jobs for which he was qualified, “[i]ntentionally passing over [Fowlkes] by choosing other men to receive [the] construction work” that he sought. 2011 Am. Compl. at 17. Fowlkes further alleges that O’Rourke received calls specifically requesting him for particular jobs for which he had the requisite skills, but that O’Rourke and Doyle passed him over in favor of others “with

¹ On review of this dismissal for lack of subject matter jurisdiction, we construe the facts in the light most favorable to Fowlkes. *See TradeComet.com LLC v. Google, Inc.*, 647 F.3d 472, 475 (2d Cir. 2011).

1 lesser skill level.” *Id.* at 19. The Local’s failure to refer Fowlkes for assignments
2 allegedly continued through 2011; in that year, Fowlkes claims to have worked a
3 total of only sixty-seven hours as a journeyman, again as a result of defendants’
4 “refusal to refer and give [him] work.” *Id.* at 21.

5 Fowlkes alleges that defendants failed to refer him for work for two
6 primary reasons. First, he asserts that defendants discriminated against him on
7 the basis of sex: Fowlkes claims that if he had “acted with a femin[in]e character
8 or worked with less musc[le], he might [have] not [incurred] [i]ntentional
9 passing over.” *Id.* at 16; *see also id.* at 25 (alleging that defendants told him that he
10 “would get a good job if [he] would act like a girl”). Second, Fowlkes recounts
11 that Doyle and O’Rourke each told him that they refused to refer him for work
12 because he had previously filed a suit against the Local.² He explains that, when
13 he inquired why he was not receiving work despite his position at the “top of the
14 out of work list,” O’Rourke allegedly responded by saying “well you’re suing
15 [sic] us,” and Doyle similarly replied that Fowlkes “should[n’t] [have] tried to
16 sue us.” *Id.* at 17.

17 Beyond defendants’ alleged refusal to refer him for work, Fowlkes also
18 claims that he was subjected to discriminatory treatment at job sites on account

² As discussed *infra*, Fowlkes filed a discrimination charge against the Local in 2007.

1 of his sex, and he suggests that the defendants' response to that treatment reflects
2 their discriminatory stance towards him. For example, he alleges that in 2008, a
3 welder at a job site told him, "I always thought you would be a girl that would
4 work and make the man happy." *Id.* at 15. The welder became angry at
5 Fowlkes's response and began "throwing welding leads around," endangering
6 Fowlkes, who then reported the incident to a superior at the job site. *Id.* at 16.
7 The superior informed Doyle and O'Rourke of Fowlkes's report and the welder's
8 behavior. Fowlkes complains that "there were no attempts . . . to correct or
9 remove the situation" and that Doyle and O'Rourke "found the actions of the
10 welder . . . amus[ing]" and "told [Fowlkes] to just keep working." *Id.*

11 **II. Procedural Background**

12 **a. Fowlkes's Prior Action**

13 On May 29, 2007, Fowlkes initiated proceedings before the Equal
14 Employment Opportunity Commission ("EEOC"), charging the Local with
15 discrimination and alleging that the Local subjected him to retaliation and sex-
16 based discrimination in violation of Title VII.³ The EEOC issued Fowlkes a
17 "Right to Sue" letter dated July 10, 2007: The letter notified him that, after

³ At that time, Fowlkes self-identified as a female in formal documents and referred to himself as "Ms. Cole Fowlkes." The substance of his claims, however, mirrored that presented in the current suit.

1 concluding its investigation, the EEOC had decided not to take further action
2 against the Local. It advised that Fowlkes was free to pursue his Title VII claims
3 by filing a federal suit against the Local within ninety days of his receipt of the
4 letter. It was not until more than 180 days later, however—on January 25, 2008—
5 that Fowlkes filed a complaint against defendants in the United States District
6 Court for the Southern District of New York.

7 Proceeding *pro se* in that 2008 action, Fowlkes made essentially the same
8 allegations as he had in his EEOC charge. Defendants moved for summary
9 judgment. In early 2010, Magistrate Judge Freeman issued a Report and
10 Recommendation (“R&R”) concluding, on the ground that Fowlkes’s action was
11 untimely, that defendants’ motion should be granted. Shortly thereafter, Judge
12 Kaplan granted defendants’ motion for substantially the reason given in the
13 R&R.

14 **b. Fowlkes’s Second Action**

15 In July 2011, Fowlkes filed a second complaint, again in the Southern
16 District of New York and again proceeding *pro se*, alleging that defendants
17 violated his “Civil Rights (involving Employment)” by subjecting him to
18 harassment and refusing to refer him for work based on his sex.⁴ 2011 Compl. at

⁴ In this complaint, Fowlkes referred to himself as “Mr. Cole Fowlkes.”

2. The allegations in this 2011 complaint covered the period from 2005 through 2011. Concurrently, Fowlkes sought permission to proceed *in forma pauperis*.

In October 2011, the District Court granted Fowlkes’s request to proceed *in forma pauperis* and directed Fowlkes to submit an amended complaint within sixty days. In the same order, the District Court, citing its authority under 28 U.S.C. § 1915(e)(2)(B) “to screen *sua sponte* an *in forma pauperis* complaint at any time,”⁵ considered its jurisdiction over the matter. J.A. 17. It first construed Fowlkes’s complaint as raising claims under three statutes: Title VII; the New York State Human Rights Law (“NYSHRL”), N.Y. Exec. Law § 290, *et seq.*; and the New York City Human Rights Law (“NYCHRL”), N.Y. City Admin. Code § 8-101, *et seq.* The District Court then observed, “Before a federal court may review a claim under Title VII, a plaintiff must first exhaust his administrative remedies by filing a charge with the EEOC or an appropriate state agency within 300 days of the unlawful discriminatory act.” *Id.* at 22. Because Fowlkes did not allege that he had filed a complaint with the EEOC or any New York agency relating to conduct occurring *after* May 29, 2007,⁶ the District Court’s subject matter

⁵ Under 28 U.S.C. § 1915(e)(2)(B)(ii), a court must dismiss “at any time” an *in forma pauperis* complaint that “fails to state a claim on which relief may be granted.” *See also Giano v. Goord*, 250 F.3d 146, 149 (2d Cir. 2001).

⁶ As noted above, Fowlkes filed a charge with the EEOC on May 29, 2007, and the federal suit based on the conduct alleged in that charge was dismissed on timeliness grounds in early 2010.

1 jurisdiction over Fowlkes's Title VII claim was uncertain, it warned. In light of
2 Fowlkes's *pro se* status, the District Court granted him leave to amend his
3 complaint to "(1) detail his Title VII and New York State and City Human Rights
4 Law claims of discrimination that were not already raised in the Prior [Action] as
5 set forth above, and (2) allege whether he received a Determination or Right to
6 Sue Letter or whether he otherwise attempted to exhaust his administrative
7 remedies." *Id.* at 26.

8 In November 2011, Fowlkes filed an amended complaint, as directed. On
9 December 20, 2011, again acting *sua sponte* pursuant to its authority under 28
10 U.S.C. § 1915(e)(2)(B), the District Court held that Fowlkes's Title VII claim "must
11 be dismissed because he does not allege that he exhausted his administrative
12 remedies." *Id.* at 73 (citing 42 U.S.C. § 2000e-5(e)(1)). The District Court
13 elaborated that "because Plaintiff has not exhausted his Title VII claim, the Court
14 does not have jurisdiction over that Title VII claim." *Id.* Having dismissed the
15 Title VII claims, the District Court then determined that only state- and city-law
16 claims remained and concluded that it lacked subject matter jurisdiction to
17 adjudicate those claims standing alone. It therefore dismissed the case *in toto*.

1 Fowlkes timely appealed.⁷

2 **DISCUSSION**⁸

3 On appeal, Fowlkes argues that the District Court erred in dismissing his
4 amended complaint because exhaustion of administrative remedies before filing
5 a Title VII action in federal court is a not a jurisdictional requirement, but rather a
6 precondition of suit that may be subject to equitable defenses. On the merits,
7 Fowlkes asserts that he has adequately pleaded claims for both violations of Title
8 VII and breach of the duty of fair representation under the NLRA. He further
9 argues that, assuming he sufficiently pleaded at least one federal claim, the
10 District Court erroneously declined to exercise supplemental jurisdiction over his
11 pendent state- and city-law claims.

12 For the reasons discussed below, we agree with Fowlkes that a plaintiff's
13 failure to exhaust administrative remedies available for Title VII claims does not
14 pose a jurisdictional bar to a district court's consideration of those claims. We
15 also conclude that he has pleaded an NLRA claim that survives § 1915(e) review.

⁷ Although he proceeded in the District Court *pro se*, Fowlkes is now ably represented by court-appointed counsel.

⁸ We review *de novo* a district court's *sua sponte* dismissal of an *in forma pauperis* complaint pursuant to 28 U.S.C. § 1915(e)(2)(B). *McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir. 2004).

1 We therefore vacate the judgment of the District Court and remand for further
2 proceedings.

3 **I. Subject Matter Jurisdiction and the Failure to Exhaust Administrative**
4 **Remedies for Title VII Claims**

5 It is well established that Title VII requires a plaintiff to exhaust
6 administrative remedies before filing suit in federal court. *See, e.g., Ragone v. Atl.*
7 *Video at Manhattan Ctr.*, 595 F.3d 115, 126 (2d Cir. 2010) (citing 42 U.S.C. § 2000e-
8 5(e) and (f)); *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 686 (2d Cir.
9 2001) (same). “The purpose of this exhaustion requirement is to give the
10 administrative agency the opportunity to investigate, mediate, and take remedial
11 action.” *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 712 (2d Cir. 1998) (internal
12 quotation marks omitted). The administrative exhaustion requirement applies to
13 *pro se* and counseled plaintiffs alike. *See Pikulin v. City Univ. of N.Y.*, 176 F.3d 598,
14 599–600 (2d Cir. 1999) (per curiam).

15 “Exhaustion of administrative remedies through the EEOC is an essential
16 element of the Title VII . . . statutory scheme[]”; accordingly, it is “a precondition
17 to bringing such claims in federal court.” *Legnani*, 274 F.3d at 686 (internal
18 quotation marks omitted); *see also Deravin v. Kerik*, 335 F.3d 195, 200 (2d Cir. 2003)
19 (“As a precondition to filing a Title VII claim in federal court, a plaintiff must first
20 pursue available administrative remedies . . .”). The weight of precedent

1 demonstrates that administrative exhaustion is not a *jurisdictional* requirement;
2 rather, it is merely a precondition of suit and, accordingly, it is subject to
3 equitable defenses.

4 The distinction has been effectively drawn by the Supreme Court. In *Zipes*
5 *v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), a group of flight attendants
6 brought a class action alleging that TWA unlawfully discriminated against them
7 on the basis of sex in violation of Title VII, *id.* at 388. Approximately 92% of the
8 plaintiffs had not timely filed claims with the EEOC before the suit was brought
9 in federal court. *Id.* at 390. After the Seventh Circuit Court of Appeals held that
10 these claims were “jurisdictionally barred,” the plaintiffs appealed, asking the
11 Supreme Court to address the “single question . . . whether the timely filing of an
12 EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit in federal
13 court or whether the requirement is subject to waiver and estoppel.” *Id.* at 390,
14 392. The Supreme Court sided with the plaintiffs, holding that “filing a timely
15 charge of discrimination with the EEOC is *not* a jurisdictional prerequisite to suit
16 in federal court, but a requirement that . . . is subject to waiver, estoppel, and
17 equitable tolling.” *Id.* at 393 (emphasis added). According to the Court, this
18 conclusion was dictated by “[t]he structure of Title VII, the congressional policy
19 underlying it, and the reasoning of [its] cases.” *Id.* Particularly relevant here, the

1 Court cited in support of its conclusion two cases in which at least some of the
2 plaintiffs seeking relief in federal court—like Fowlkes with regard to his
3 allegations of post-May 29, 2007 misconduct—had never filed an EEOC charge at
4 all. *See id.* at 396–97 (citing *Franks v. Bowman Transportation Co.*, 424 U.S. 747
5 (1976), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)).

6 In line with *Zipes*, our Court has previously ruled that the exhaustion of
7 administrative remedies “is a precondition to bringing a Title VII claim in federal
8 court, rather than a jurisdictional requirement.” *Francis v. City of New York*, 235
9 F.3d 763, 768 (2d Cir. 2000) (internal quotation marks omitted); *see also Boos v.*
10 *Runyon*, 201 F.3d 178, 182 (2d Cir. 2000) (analyzing the statutory structure of Title
11 VII to conclude that “the exhaustion requirement, while weighty, is not
12 jurisdictional”). For example, in *Francis*, we held that the district court had
13 subject matter jurisdiction to hear the plaintiff’s Title VII failure-to-promote
14 claim, even though his proper exhaustion of the claim was “not free from
15 uncertainty,” because failure to exhaust was merely a defense subject to waiver.
16 *Id.* at 766. Similarly here, the question whether Fowlkes properly exhausted his
17 claims is “not free from uncertainty,” *id.*, but this ambiguity has no bearing on
18 the subject matter jurisdiction of the District Court.

1 Occasionally, passing descriptions of the exhaustion requirement as
2 “jurisdictional” can be found in our Circuit’s jurisprudence. *See, e.g., Fitzgerald v.*
3 *Henderson*, 251 F.3d 345, 359 (2d Cir. 2001) (“If a [Title VII] claimant has failed to
4 pursue a given claim in administrative proceedings, the federal court generally
5 lacks jurisdiction to adjudicate that claim.”); *Shah v. N.Y.S. Dep’t of Civil Serv.*, 168
6 F.3d 610, 613 (2d Cir. 1999) (“The federal courts generally have no jurisdiction to
7 hear claims not alleged in an employee’s EEOC charge.”). But “when our
8 decisions have turned on the question . . . whether proper administrative
9 exhaustion [of a Title VII claim] is a jurisdictional prerequisite . . . to bringing
10 suit,” we have “consistently” held that it is not. *Francis*, 235 F.3d at 768. We
11 therefore take this opportunity to underscore that the failure of a Title VII
12 plaintiff to exhaust administrative remedies raises no jurisdictional bar to the
13 claim proceeding in federal court.

14 As suggested above, the mischaracterization of a Title VII plaintiff’s
15 administrative exhaustion requirement as “jurisdictional” has practical effect. A
16 “[c]ourt has no authority to create equitable exceptions to jurisdictional
17 requirements.” *Bowles v. Russell*, 551 U.S. 205, 214 (2007). In contrast, a
18 mandatory but nonjurisdictional prerequisite to suit may be subject to equitable
19 defenses. *See id.* at 216 (Souter, J., dissenting); *see also Fernandez v. Chertoff*, 471

1 F.3d 45, 58 (2d Cir. 2006) (“Because [the] failure to exhaust [one’s] administrative
2 remedies is not a jurisdictional defect, it is subject to equitable defenses.”). By
3 treating the issue of subject matter jurisdiction as a threshold matter here, the
4 District Court did not consider any potential equitable defenses that Fowlkes
5 might present to excuse his failure to exhaust his administrative remedies.

6 It is not clear from the record, at this stage, whether an equitable principle
7 may excuse Fowlkes’s failure to exhaust before filing his 2011 complaint. As
8 Fowlkes has urged in his brief on appeal—and defendants have challenged—two
9 equitable doctrines that the District Court will be called on to consider on
10 remand are futility and “reasonable relatedness.” Because of their direct bearing
11 on the facts as alleged, we discuss aspects of each of these possible defenses
12 below.

13 When an agency has previously “taken a firm stand” against a plaintiff’s
14 position, the plaintiff’s failure to exhaust administrative remedies may be
15 excused on the ground that exhaustion would be futile. *Skubel v. Fuoroli*, 113 F.3d
16 330, 334 (2d Cir. 1997) (internal quotation marks omitted); *cf. Kirkendall v.*
17 *Halliburton, Inc.*, 707 F.3d 173, 179 (2d Cir. 2013) (noting that the exhaustion
18 requirement for ERISA claims “is not absolute” and may be excused when a
19 plaintiff demonstrates that pursuing administrative remedies would be futile).

1 Though our Circuit has not had occasion to consider this particular
2 equitable defense in the context of EEOC Title VII exhaustion, Fowlkes may have
3 a colorable argument that filing a charge alleging discrimination based on his
4 transgender status would have been futile. When Fowlkes filed his 2011
5 complaint, the EEOC had developed a consistent body of decisions that did not
6 recognize Title VII claims based on the complainant's transgender status. *See,*
7 *e.g., Kowalczyk v. Dep't of Veterans Affairs*, No. 01942053, 1994 WL 744529, at *2
8 (E.E.O.C. Dec. 27, 1994) (concluding that an "appellant's allegation of
9 discrimination based on her acquired sex (transsexualism) is not a basis
10 protected under Title VII"); *Campbell v. Dep't of Agriculture*, No. 01931730, 1994
11 WL 652840, at *1 n.3 (E.E.O.C. July 21, 1994) (recognizing precedent holding that
12 "gender dysphoria or transsexualism is not protected under Title VII under the
13 aegis of sex discrimination"); *Casoni v. U.S. Postal Serv.*, No. 01840104, 1984 WL
14 485399, at *3 (E.E.O.C. Sept. 28, 1984) ("[A]ppellant's allegation of sex
15 discrimination on account of being a male to female preoperative transsexual . . .
16 [is] not cognizable . . . under the provisions of Title VII."). It was not until *Macy*
17 *v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012), published
18 after Fowlkes filed his 2011 complaint, that the EEOC altered its position and
19 concluded that discrimination against transgender individuals based on their

1 transgender status does constitute sex-based discrimination in violation of Title
2 VII. *Id.* at *11 & n.16. Thus, Fowlkes’s failure to exhaust could potentially be
3 excused on the grounds that, in 2011, the EEOC had “taken a firm stand” against
4 recognizing his Title VII discrimination claims.

5 A second equitable defense potentially available to Fowlkes is that his
6 more recent allegations of discrimination may be “reasonably related” to the
7 discrimination about which he had filed an earlier charge with the EEOC.
8 “[W]here the complaint is one alleging retaliation by an employer against an
9 employee for filing an EEOC charge,” or “where the complaint alleges further
10 incidents of discrimination carried out in precisely the same manner alleged in
11 the EEOC charge,” the failure to raise the allegations in the complaint before the
12 EEOC may not bar federal court proceedings. *Terry v. Ashcroft*, 336 F.3d 128, 151
13 (2d Cir. 2003) (internal quotation marks omitted).

14 Here, Fowlkes alleges in his amended complaint that he was not referred
15 for work as retaliation for having previously sued defendants. In addition, the
16 District Court may reasonably determine that Fowlkes was discriminated against
17 by defendants “in precisely the same manner” in the years leading up to the
18 amended complaint as was alleged in the earlier EEOC charge. Given the
19 contents of Fowlkes’s amended complaint and the close resemblance that it bore

1 to his earlier EEOC charge, his more recent allegations may be “reasonably
2 related” to those included in his earlier administrative filing with the EEOC.

3 As we have mentioned, the District Court has not yet had an opportunity
4 to consider whether futility is a cognizable equitable defense in the context of
5 EEOC Title VII exhaustion and, in this particular case, whether futility,
6 “reasonable relatedness,” or any other equitable doctrine excuses Fowlkes’s
7 failure to exhaust his administrative remedies. We therefore remand to the
8 District Court to address these questions in the first instance, on full briefing by
9 the parties.⁹

10 **II. Duty of Fair Representation Claim**

11 The District Court construed Fowlkes’s complaint as raising claims under
12 only one federal statute: Title VII. Fowlkes contends on appeal that he also
13 stated a claim against the Local under the NLRA for breach of the duty of fair
14 representation. Although he articulated that claim less than plainly, we are
15 inclined to agree with Fowlkes on appeal.

⁹ We further decline to consider the merits of Fowlkes’s Title VII claims at this juncture. If the District Court determines that Fowlkes’s failure to exhaust his administrative remedies cannot be excused, then Fowlkes has not satisfied a necessary predicate for his Title VII claims, and those claims may be dismissed without examining his substantive allegations. Thus, our consideration of the merits of Fowlkes’s Title VII claims would be premature.

1 Because Fowlkes appeared *pro se* before the District Court, he is “entitled
2 to special solicitude,” and we will read his pleadings “to raise the strongest
3 arguments that they suggest.” *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471,
4 477 (2d Cir. 2006) (internal quotation marks omitted). “[D]ismissal of a *pro se*
5 claim as insufficiently pleaded is appropriate only in the most unsustainable of
6 cases.” *Boykin v. KeyCorp*, 521 F.3d 202, 216 (2d Cir. 2008). At the same time, a *pro*
7 *se* complaint must allege “enough facts to state a claim to relief that is plausible
8 on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

9 The duty of fair representation is a “statutory obligation” under the NLRA,
10 requiring a union “to serve the interests of all members without hostility or
11 discrimination . . . , to exercise its discretion with complete good faith and
12 honesty, and to avoid arbitrary conduct.” *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).
13 This duty applies in the hiring hall setting because, there, “members of the
14 [union] have entrusted the union with the task of representing them” and it is
15 essential that work be assigned “in a nonarbitrary and nondiscriminatory
16 fashion.” *Breining v. Sheet Metal Workers Int’l Ass’n Local Union No. 6*, 493 U.S.
17 67, 88 (1989). A union breaches its duty of fair representation if its actions with

1 respect to a member are arbitrary, discriminatory, or taken in bad faith. *Air Line*
2 *Pilots Ass’n, Int’l v. O’Neill*, 499 U.S. 65, 67 (1991).¹⁰

3 Although Fowlkes’s amended *pro se* complaint did not flag the NLRA, we
4 nonetheless are persuaded, with the benefit of a counseled brief on Fowlkes’s
5 behalf, that Fowlkes has stated a plausible claim for a breach of the duty of fair
6 representation. In his amended complaint, Fowlkes alleges that the Local
7 refused to refer him for work for which he was qualified because of his
8 transgender status and in retaliation for instituting legal proceedings against the
9 Local. Allegations that a union abused its hiring hall procedures to undermine a
10 member’s employment opportunities warrant particularly close scrutiny when a
11 union wields special power as the administrator of a hiring hall. *Breining*, 493
12 U.S. at 89; *see also Gilbert v. Country Music Ass’n, Inc.*, 432 F. App’x 516, 521 (6th
13 Cir. 2011). Assuming, as we must, that Fowlkes’s allegations are true, the Local’s
14 conduct was at the very least arbitrary, if not discriminatory or indicative of bad
15 faith.

16 In urging us to sustain the dismissal of this claim, too, defendants assert
17 that a six-month statute of limitations applies to duty of fair representation

¹⁰ A duty of fair representation cause of action does not lie against the individual defendants Doyle and O’Rourke. *See Morris v. Local 819, Int’l Bhd. of Teamsters*, 169 F.3d 782, 784 (2d Cir. 1999) (per curiam). Such a claim may be stated only against a union. *Id.*

1 claims, arguing that, to survive, Fowlkes's claim must arise out of events
2 occurring in the six months prior to the filing of his 2011 complaint.¹¹ *See Coureau*
3 *v. Granfield*, 556 F. App'x 40, 41 (2d Cir. 2014). Because Fowlkes's allegations
4 regarding their conduct during the relevant six-month period—from January 29,
5 2011 through July 29, 2011—fail to plausibly state a claim, they say, his suit on
6 this ground is barred.

7 Even assuming the applicability of a six-month statute of limitations,
8 defendants are incorrect that Fowlkes has failed to plausibly state a claim.
9 Fowlkes asserts in his amended complaint that the Local would not provide him
10 employment *throughout* 2011. 2011 Am. Compl. at 3. He alleges that he received
11 only 67 hours of work in all of 2011, "less than a two week period" in total, and
12 that he was told in May and June of that year that he "could forget about getting
13 any work." *Id.* at 21. Based on the foregoing, Fowlkes plausibly stated a duty of
14 fair representation claim based on conduct occurring within the six-month
15 statute of limitations period.

16 Second, defendants contend that Fowlkes's claim for breach of the duty of
17 fair representation is irretrievably undermined by the complaint's own

¹¹ As previously discussed, Fowlkes originally filed his complaint in the District Court in July 2011. At the instruction of the court, he amended the complaint and refiled in November 2011. The parties do not dispute that the statute of limitations period for Fowlkes's duty of fair representation claim would run from the date of the original pleading—here, July 29, 2011.

1 allegations, which reflect that Fowlkes was, in fact, referred for work in May and
2 June 2011. This argument rests on an obvious fallacy: the mere fact that Fowlkes
3 was referred for *some* work during the relevant period does not defeat a claim
4 that he was subjected to arbitrary, discriminatory, or bad-faith treatment by the
5 Local's overall distribution of work. A union need not completely eliminate a
6 member's employment opportunities before the member may be entitled to
7 relief.

8 Finally, defendants argue that Fowlkes may not pursue a duty of fair
9 representation claim in court because he failed to demonstrate that he exhausted
10 his remedies within the union. This argument, too, is unavailing. The union, not
11 the member, bears the burden of demonstrating that the member failed to
12 exhaust intra-union grievance procedures, *see Johnson v. Gen. Motors*, 641 F.2d
13 1075, 1079 (2d Cir. 1981), and "courts have discretion to decide whether to
14 require exhaustion of internal union procedures," *Clayton v. Int'l Union, United*
15 *Auto., Aerospace, and Agric. Implement Workers of Am.*, 451 U.S. 679, 689 (1981).
16 Defendants may attempt to meet this burden before the District Court on
17 remand, but a cursory invocation of an intra-union exhaustion requirement in
18 their appellate brief certainly does not suffice to bar the duty of fair
19 representation claim from proceeding past the pleadings stage.

1 In sum, we conclude that Fowlkes has stated a claim for breach of the duty
2 of fair representation against the Local. We vacate the District Court's
3 determination that Fowlkes stated federal claims under only Title VII, and we
4 remand for further proceedings on his duty of fair representation claim.

5 **III. Pendent State- and City-Law Claims**

6 Fowlkes also appeals the District Court's dismissal of his pendent state-
7 and city-law claims under the NYSHRL and NYCHRL. This decision is reviewed
8 for abuse of discretion. *Fed. Treasury Enter. Sojuzplodoimport v. SPI Spirits Ltd.*, 726
9 F.3d 62, 84 (2d Cir. 2013). To find an abuse of discretion, "we must conclude that
10 a challenged ruling rests on an error of law, a clearly erroneous finding of fact, or
11 otherwise cannot be located within the range of permissible decisions." *United*
12 *States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 99 (2d Cir. 2014).

13 Here, the District Court dismissed the state- and city-law claims based on
14 the premise that Fowlkes did not plead a federal claim for which there exists
15 subject matter jurisdiction. Because we have now concluded that (1) Fowlkes's
16 failure to exhaust administrative remedies did not deprive the District Court of
17 jurisdiction over his Title VII claims, and (2) Fowlkes has stated a claim under the
18 NLRA for breach of the duty of fair representation, we vacate the dismissal of
19 Fowlkes's pendent state- and city-law claims to allow the District Court to

1 reconsider on remand whether exercising supplemental jurisdiction is
2 appropriate given our conclusions regarding his federal claims.

3 **CONCLUSION**

4 For the foregoing reasons, we **VACATE** the judgment of the District Court
5 and **REMAND** for further proceedings consistent with this opinion.